In the Supreme Court of the United States

October Term, 1973

Supreme Court, U.S.
FILED
DEC 18
MICHAEL RODAK, JR.

No. 73-801

MELVIN T. SMITH,

Petitioner

v.

FERRON. G. LOSEE, ANDREW H. BARNUM, DALE PETERSON, LeGRAND P. BACKMAN, SHELDON S. ALLRED, EDNA H. BAKER DEXTER C. SNOW, A. REED MORRILL, N. RUSSELL TANNER, HELEN B. URE, GAYLE E. RIDDLE, and LYNN S. RICHARDS,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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The first question presented by Petitioner in his Petition for a Writ of Certiorari is stated as follows:

> Whether the members of a State Board of Education who, acting upon the recommendation of the president of a state college, terminated the employment of an associate professor at the

> college in retaliation for his political and other free-speech activities, and who failed to give the professor a hearing to which he was entitled under the due process clause of the Fourteenth Amendment, are protected from personal liability under 42 U.S.C. § 1983 by the doctrine of "official immunity."

We have repeated this question because it contains the phrase ". . . who failed to give the professor a hearing to which he was entitled under the due process clause . . ." The question of due process of law was not discussed in the majority opinion of the Court of Appeals, probably for the reason that on two occassions the Petitioner was offered an opportunity to appear before the Utah State Board of Education. This fact was mentioned by Judge Barrett in his concurring in part and dissenting in part opinion in which he said:

> After the Board concurred in Smith's contract non-renewal Smith asked the Board to provide him a hearing. The Board, with Smith's approval, made a special trip to Dixie College to hear him out. The last minute Smith declined to appear because he had been advised by someone that he should have counsel. The Board thereafter agreed to hear Smith out at a meeting to be held in Salt Lake City. Smith had agreed to appear and had requested the hearing. Again, Smith failed and neglected to appear before the Board, While it is unlikely that the Board would have reversed its position concerning Smith's non-tenure, non-renewal status, still the fact remains that Smith, after requesting a hearing before the Board, displayed bad faith in not

availing himself of the hearing opportunities afforded him. That alone should foreclose his claims.

Petitioner urges the Court to grant ceriorari on the basis that the instant case "would give the Court an opportunity to consider the immunity issue on a full trial record, and in a different context which occurs more commonly under Section 1983." This Court has considered many cases arising under Section 1983, the more pertinent ones of which are cited and discussed in the Court of Appeals decision in this case, and has already established guidelines for the application of the immunity doctrine, particularly with respect to the "good faith and probable cause" test approved in *Pierson v. Ray,* 386 U.S. 547, and which the Court of Appeals in the instant case followed in holding that the Utah State Board of Education was entitled to a qualified privilege defense. Presently pending before the Court are the cases of *Scheuer v. Rhodes,* No. 72-914, and *Krause v. Rhodes,* No. 72-1318 (certiorari granted June 26, 1973). Inasmuch as the governor of a state and the president of a university are among the defendants in those cases ,it appears that the issue of official immunity for administrative officers would be squarely before the Court. Certainly, it is not necessary that this court consider the question of official immunity with respect to every category of public administrative officers.

The second question presented by the Petitioner is as follows:

Whether a college professor whose employ-

> ment at a state college is terminated in violation of his rights under the First and Fourteenth Amendments is entitled, in an action under 42 U.S.C. § 1983, to recover not only his lost salary and other out-of-pocket losses, but also compensation for the humiliation, injury to reputation, and disruption of career plans which he suffered as a result of the termination.

In connection with this question, the Petitioner asserts that the decision of the Court of Appeals with respect to damages is directly in conflict with the decision of the Ninth Circuit Court of Appeals in *Donovan v. Reinbold*, 433 F.2d 738. This assertion appears to be without foundation for in *Donovan v. Reinbold* the Court, in reviewing the record, found that there was sufficient evidence to support the trial court's award of compensatory damages. In the instant case, the Court of Appeals did not rule that damages could not be awarded for humiliation, injury to reputation, or disruption to career plans, but rather it found that the evidence in the instant case did not support an award of such damages, saying (page 19a of the Petition for a Writ of Certiorari):

> As a proof of damages, the record contains no evidence to support an award of general damages, As to this matter, plaintiff testified that he attempted to find a teaching position at other schools but was unable to do so. He did find another position with the state at a comparable or better salary. He is entitled to no damages just by reason of a change of jobs. There was no showing as to any effect resulting from the inability to find a teaching position. There was

evidence that he was, in the words of the trial court, harassed by defendants Losee and Barnum. However, there is no pendent cause for defamation or any related cause. Many, if not all, of the incidents complained of appear to have taken place after the discharge was announced, although under the record it is difficult to determine just when the actual termination was effective. We must hold that the award of general damages was without adequate basis in the facts, and must be set aside.

It is evident from the foregoing that the second question or issue presented by the Petitioner is without substance in view of the Court of Appeal's finding that there was insufficient evidence to support an award of damages for the type of injury raised in the question.

CONCLUSION

For the reasons stated above, Respondents request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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